

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**CROSSROADS GRASSROOTS POLICY STRATEGIES**

**1401 New York Avenue, NW, Suite 1200  
Washington DC 20005,**

*Plaintiff,*

**v.**

**U.S. DEPARTMENT OF HEALTH AND HUMAN  
SERVICES**

**200 Independence Avenue, S.W.  
Washington, D.C. 20201,**

*Defendant.*

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

Plaintiff Crossroads Grassroots Policy Strategies (“Crossroads”), by and through the undersigned counsel, brings this action against Defendant U.S. Department of Health and Human Services (“HHS”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefore, Crossroads alleges as follows:

**JURISDICTION AND VENUE**

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

**PARTIES**

3. Plaintiff Crossroads, an Internal Revenue Code Section 501(c)(4) independent, non-profit organization located at 1401 New York Avenue, NW, Suite 1200, Washington DC 20005, is a policy and grassroots advocacy organization committed to educating, equipping, and

mobilizing millions of American citizens to take action on the critical economic and legislative issues that will shape the nation's future in the years ahead.

4. Defendant HHS is an agency of the United States Government and is headquartered at 200 Independence Avenue, S.W., Washington, D.C. 20201. Defendant has possession, custody, and control of records to which Crossroads seeks access.

### **STATEMENT OF FACTS**

5. On April 19, 2011, Crossroads sent a FOIA request to the FOIA Office of HHS (attached hereto as Exhibit 1), seeking access to:

- a. "All applications for participation in the Early Retiree Reinsurance Program ("ERRP") established pursuant to Section 1102 of the Patient Protection and Affordable Care Act";
- b. "Any and all memoranda, guidance, directives, instructions and other documents – whether electronic or written and whether distributed internally or externally – relating to the criteria to be applied by HHS in deciding whether to grant or deny applications for participation in the ERRP";
- c. "Any and all memoranda, notes, letters and other documents – whether electronic or written and whether distributed internally or externally – relating to the approval, denial or consideration of applications for participation in the ERRP, including but not limited to any letters submitted to HHS in support of or against such application, such as any letters submitted by members of the United States Congress, state officials or local officials";
- d. "All claims for reimbursement submitted to HHS under the ERRP";
- e. "Any and all memoranda, guidance, directives, instructions and other documents – whether electronic or written and whether distributed internally or externally – relating to the criteria to be applied by HHS in deciding whether to pay a claim submitted for reimbursement under the ERRP"; and
- f. "Any and all memoranda, notes, letters and other documents – whether electronic or written and whether distributed internally or externally – relating to the approval, denial or consideration

of claims for reimbursement under the ERRP, including but not limited to any letters submitted to HHS in support of or against such claim reimbursement, such as any letters submitted by members of the United States Congress, state officials or local officials.”

6. The request was sent by facsimile and was successfully transmitted.

7. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), HHS was required to respond to Crossroads’ request within twenty business days, or on or before May 17, 2011.

8. By postcard dated April 22, 2011 (attached hereto as Exhibit 2), HHS acknowledged its receipt of the request on April 21, 2011. Additionally, the postcard notified Crossroads that the request was forwarded to the Centers for Medicare & Medicaid Services (“CMS”). Although HHS stated that the request would be processed “as expeditiously as possible,” it did not give a specific time by which CMS would respond, nor did it otherwise indicate any issues with the request.

9. By letter dated April 26, 2011 (attached hereto as Exhibit 3), CMS Freedom of Information Group Director Michael S. Marquis acknowledged CMS’ receipt of the request and assigned it a control number and PIN. The letter also listed the following “unusual and exceptional circumstances” as impacting the office’s response time: “(1) we will need to search for and collect records from components and/or field offices external to this office; and (2) because we receive a very heavy volume of FOIA requests, we will process your request in line with our established policy of ‘first in, first out’ case processing.” The letter does not provide any other guidance regarding how long it will take the agency to complete its search.

10. On May 24, 2011, five days after the standard twenty business day deadline for FOIA requests had elapsed, Crossroads’ counsel on two separate occasions called the CMS FOIA office at the telephone number listed on the April 22 postcard. Crossroads’ counsel’s call was transferred to a voicemail box that was full and would not permit him to leave a message

requesting further information and requesting that someone contact him regarding Crossroads' request.

11. Two weeks later, on June 7, 2011, Crossroads' counsel again called the CMS FOIA office and was able to leave a voicemail, in which he requested the office return his call with a status update regarding Crossroads' request.

12. Crossroads' counsel's message was not returned.

13. On June 17, 2011, Crossroads' counsel again called the CMS FOIA office. This time, an HHS employee answered the phone. Ms. Brieta Gillard informed Crossroads' counsel that Crossroads' request was in the system and that the office was still searching for records. Crossroads' counsel asked when Crossroads could expect the office to conclude its search, and Ms. Gillard said that she would check with the responsible analyst. When Crossroads' counsel reminded Ms. Gillard that the deadline for CMS to respond to the request had passed nearly a month ago, Ms. Gillard responded that the office has a "high volume" of requests.

14. On June 29, 2011, Crossroads' counsel visited CMS' website for a status update (attached hereto as Exhibit 4). Under "Projected Date of Response" the website listed only "Undetermined"; under "Status of Request" the website stated: "FOIA request referred to program office(s) for responsive records search and fee estimate".

15. On the same date, June 29, 2011, Crossroads' counsel called Mr. Joseph Tripline at the CMS FOIA office telephone number listed in the April 26 letter and left a voicemail for Mr. Tripline requesting a status update.

16. Crossroads' counsel's message was not returned by Mr. Tripline.

17. On September 9, 2011, Crossroads' counsel again visited CMS' website for a status update (attached hereto as Exhibit 5), which was unchanged from June 29.<sup>1</sup>

18. On that same date, September 9, 2011, Crossroads' counsel again called Mr. Tripline, whose voicemail message indicated that he would be out of the office until September 12, 2011 and instructed callers to contact Ms. Angela Pompey in his absence. Crossroads' counsel left a voicemail for Mr. Tripline requesting a status update and return telephone call. Crossroads' counsel also called Ms. Pompey at the telephone number Mr. Tripline's message had provided and left her a voicemail requesting a status update. Finally, Crossroads' counsel also left a voicemail for Ms. Gillard requesting a status update.

19. Later that day, Ms. Gillard left Crossroads' counsel a voicemail indicating that CMS was still searching for responsive records. Ms. Gillard also stated that she would "elevate" the request to Michael Marquis, the Director of CMS' Freedom of Information Group, and that Crossroads' counsel could call her with any questions.

20. On September 12, 2011, Crossroads' counsel called Ms. Gillard and left her a voicemail requesting a status update.

21. On September 13, 2011, Ms. Gillard returned Crossroads' counsel's call and left him a voicemail in which she stated, "I did elevate this to Michael Marquis. I actually gave him a copy of the request, and he has your telephone number so he's expected to give you a call; I'm not exactly sure what time." Additionally, Ms. Gillard stated that she would check with the analyst to see why Crossroads had not received a response to the request.

22. As of the filing of this Complaint, Mr. Marquis has not contacted Crossroads nor Crossroads' counsel. Moreover, following her September 13, 2011 voicemail, Ms. Gillard did

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<sup>1</sup> As of the filing of this Complaint, there has been no update to the status of Crossroads' FOIA Request on the CMS website, <http://www.cms.gov/apps/FOIA/check-status.aspx>, last visited Dec. 12, 2011 (attached hereto as Exhibit 6).

not contact Crossroads or Crossroads' counsel with any information regarding why Crossroads had not received a response to the request despite, at that time, almost five months had elapsed since Crossroads' FOIA was submitted.

23. On October 18, 2011, Crossroads faxed a letter to CMS's FOIA office (attached hereto as Exhibit 7) in which Crossroads requested an immediate response to its FOIA request. In the letter, Crossroads noted that nearly six months had passed since its April 19, 2011 request and chronicled Crossroads' unsuccessful attempts to obtain information from CMS about the request.

24. In its October 18, 2011 letter, Crossroads reiterated HHS' FOIA obligations and why its need for the requested information was critical and time-sensitive:

"The need for the requested information is immediate, especially in light of the Obama Administration's scrapping of the CLASS Program. After months of defending the CLASS Program as an essential part of the Obama Administration's health care reform package, on October 14, 2011, Secretary Sebelius accepted the inevitable when she announced in a letter to Speaker of the U.S. House of Representatives John Boehner, "[d]espite our best analytical efforts, I do not see a viable path forward for CLASS implementation at this time." This admission was long overdue, as CMS' chief actuary Richard Foster warned in April 2010 that the program was not self-sustaining. Although the Obama Administration has tried to separate the CLASS Program from the rest of the health care reform package, it is increasingly evident that this legislation – including the ERRP – is not beneficial for the country. Under FOIA, we are entitled to documents that will enable us to evaluate this Administration's policies, and it is for this purpose that I seek the requested information pertaining to the ERRP applications and reimbursement claims immediately."

25. To date, neither Crossroads nor Crossroads' counsel have received any information from CMS that satisfies the request.

26. As of the date of this Complaint, HHS has failed to produce any records responsive to the request, demonstrate that responsive records will be produced, or inform Crossroads that it will not produce responsive records.

27. Because HHS failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A) or extend that time limit pursuant to 5 U.S.C. § 552(a)(6)(B), Crossroads is deemed to have exhausted any and all administrative remedies with respect to its FOIA request, pursuant to 5 U.S.C. § 552(a)(6)(C).

### **COUNT I**

#### **(Violation of the Freedom of Information Act, 5 U.S.C. § 552)**

28. Crossroads realleges paragraphs 1-27 as fully stated herein.

29. Defendant has violated FOIA by failing to produce any and all non-exempt records responsive to Crossroads' April 19, 2011 request within the twenty day time period required by 5 U.S.C. § 552(a)(6)(A)(i) and by failing to demonstrate that any withheld records responsive to this same request are exempt from production.

30. Crossroads is being irreparably harmed by reason of Defendant's violation of FOIA and will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

WHEREFORE, Crossroads respectfully requests that the Court: (1) declare Defendant's failure to comply with FOIA to be unlawful; (2) order Defendant to search for and produce any and all non-exempt records responsive to Crossroads' April 19, 2011 request; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to the request; (4) grant Crossroads an award of attorney's fees and other litigation costs reasonably

incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Crossroads such other relief as the Court deems just and proper.

Dated: December 12, 2011

Respectfully submitted,



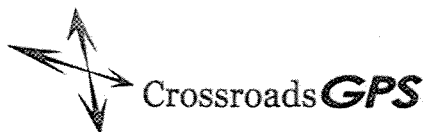
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Simon J. Torres, Bar No. 973898  
storres@morganlewis.com  
Amanda C. Dupree, Bar No. 999984  
adupree@morganlewis.com

MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, NW  
Washington, D.C. 20004  
Telephone: 202.739.3000  
Facsimile: 202.739.3001



# **EXHIBIT 1**



*Charting the Course for a New Direction for America*

April 19, 2011

**BY FACSIMILE - (202) 690-8320**

Mr. Robert Eckert  
Freedom of Information Officer  
United States Department of Health and Human Services FOIA Office  
Mary E. Switzer Building, Room 2221  
330 C Street, S.W.  
Washington, D.C. 20201

Re: Freedom of Information Act Request

Dear Mr. Eckert:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et. seq.*, as amended, we respectfully request the following documents from files maintained by the United States Department of Health and Human Services ("HHS"), including but not limited to files maintained by HHS's Office of Consumer Information and Insurance Oversight:

1. All applications for participation in the Early Retiree Reinsurance Program ("ERRP") established pursuant to Section 1102 of the Patient Protection and Affordable Care Act.
2. Any and all memoranda, guidance, directives, instructions and other documents – whether electronic or written and whether distributed internally or externally – relating to the criteria to be applied by HHS in deciding whether to grant or deny applications for participation in the ERRP.
3. Any and all memoranda, notes, letters and other documents – whether electronic or written and whether distributed internally or externally – relating to the approval, denial or consideration of applications for participation in the ERRP, including but not limited to any letters submitted to HHS in support of or against such application, such as any letters submitted by members of the United States Congress, state officials or local officials.
4. All claims for reimbursement submitted to HHS under the ERRP.

*Paid for by Crossroads Grassroots Policy Strategies, an independent, nonprofit organization exempt from federal taxation under section 501(c)(4) of the Internal Revenue Code.*

Page Two

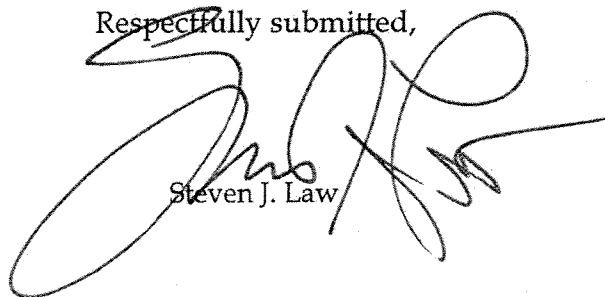
5. Any and all memoranda, guidance, directives, instructions and other documents - whether electronic or written and whether distributed internally or externally - relating to the criteria to be applied by HHS in deciding whether to pay a claim submitted for reimbursement under the ERRP.
6. Any and all memoranda, notes, letters and other documents - whether electronic or written and whether distributed internally or externally - relating to the approval, denial or consideration of claims for reimbursement under the ERRP, including but not limited to any letters submitted to HHS in support of or against such claim reimbursement, such as any letters submitted by members of the United States Congress, state officials or local officials.

As required by FOIA, please provide redacted copies of documents if the document contains some information which is subject to a FOIA exemption. If any documents are fully withheld based on a FOIA exemption, please explain the basis of such full withholding.

We will assume financial responsibility for all necessary charges incurred, including costs of the search and duplication of files. Please contact me in advance at (202) 559-6428 if the cost will exceed \$300.

Your prompt attention to this matter is appreciated. Please contact me as soon as possible at (202) 559-6428 if you are unable to fully process and respond to this request within the twenty (20) day response period provided for by the FOIA or if you have any questions related to this request. Although we believe our response is very narrowly targeted so that a full response can be provided in the 20-day response period, if some but not all of the requested documents cannot be provided in the 20-day response period, please provide a partial response with those documents that are available. Thank you in advance for your assistance.

Respectfully submitted,



Steven J. Law

## **EXHIBIT 2**



## Department of Health and Human Services

Office of the Secretary  
Washington, DC 20201

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Dear Requester:

This will acknowledge receipt of your Freedom of Information Act (FOIA) request of 7/21/11. Because your request is for records maintained by one of the Department's major operating components, CMS, it has been forwarded to them for direct response to you. While your request will be processed as expeditiously as possible, actual processing time will depend on the complexity of your request and whether it involves sensitive or voluminous records, extensive search, and/or consultation with other HHS components or other executive branch agencies. Please recognize that there may be a charge for these records and, in some cases, the charges may be substantial.

The phone number for the FOIA office  
now responsible for processing your request is 410.786.5353

Their address is: Centers for Medicare & Medicaid Services  
Northridge Rm. 722-20-06  
7500 Security Blvd.  
Baltimore, MD 21244

DEPARTMENT OF HEALTH  
AND HUMAN SERVICES

Office of the Secretary  
Washington, DC 20201

Official Business  
Penalty for Private Use \$300



Steven J. Lane  
Crossroads GPS  
1401 New York Ave, NW  
Suite 1200  
Washington, DC  
20005

## **EXHIBIT 3**

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard, Mail Stop N2-20-16  
Baltimore, Maryland 21244-1850



Office of Strategic Operations and Regulatory Affairs/ Freedom of Information Group  
Refer to: Control Number **042520117084** and PIN **ZAP9**

**4/26/2011**

**Steven Law**  
**Crossroads Grassroots Policy Strategies**  
**1401 New York Avenue, NW, Suite 1200**  
**Washington, DC 20005**

Dear Mr. Law:

This acknowledges receipt of your Freedom of Information Act (FOIA) request dated 4/19/2011 submitted to the Centers for Medicare & Medicaid Services (CMS) or one of this agency's Medicare contractors via letter, facsimile transmission or e-mail, or in the form of a subpoena duces tecum or Provider Reimbursement Review Board discovery request to CMS.

If you are seeking personalized information pertaining to your Medicare benefits and services, including claim information (excluding Part D claims) you may access this information online through the following CMS website: [www.MyMedicare.gov](http://www.MyMedicare.gov).

We have initiated a search to locate records falling within the scope of your request. If our searching units advise us that you have requested a voluminous amount of records that require extensive search and examination, my staff will contact you shortly to discuss your willingness to modify your request.

The FOIA requires that we respond to your request within 20 working days of its receipt in this office. Please note the following unusual and exceptional circumstances that will impact our response time: (1) we will need to search for and collect records from components and/or field offices external to this office; and (2) because we receive a very heavy volume of FOIA requests, we will process your request in line with our established policy of "first in, first out" case processing. This policy is consistent with court decisions regarding FOIA's time limits. To check the status of your request please refer to the CMS FOIA website at [www.cms.gov/FOIA/04b\\_CheckStatus.asp](http://www.cms.gov/FOIA/04b_CheckStatus.asp). The status of your request is displayed after you have entered the control number and PIN number in the appropriate fields.

The law authorizes us to collect fees for responding to FOIA requests and assume that you are willing to pay any applicable fees for processing this request. If at any time the fee for processing your request is estimated to exceed \$250.00, we will send you an invoice for the



estimated fee and suspend further processing until payment of the invoiced amount is received. If the estimated processing fee does not exceed \$250.00, we will send you an invoice for the actual fee with our response.

Please note the following:

If you believe that we should expedite the processing of your request because the requested records are needed in light of a compelling need; i.e., an imminent threat to the life and safety of an individual; an urgency to inform the public concerning government activity (provided you are a member of the media); a deadline in litigation; a deadline for commenting on proposed regulations; or other urgent matters, you must ask for expedited processing in writing and provide to this office as much relevant information as possible. In line with 5 U.S.C. § 552(a)(6)(E)(vi), you must demonstrate the compelling need in a statement certified to be true and correct to the best of your knowledge and belief. Attach any supporting documentation to your statement, including a court scheduling order if your request is based upon a litigation deadline. (Fax supporting documentation to the Freedom of Information Group at (410) 786-0474).

If your request seeks a waiver or reduction of the fees that we would customarily charge for furnishing agency records and your request does not contain sufficient information to enable us to determine whether a waiver or reduction of fees is warranted, you should provide such information to this office within 10 working days of receipt of this letter. In line with 45 C.F.R. § 5.45, such information must include a detailed explanation of how disclosure to you: (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester. I especially need to know how you intend to disseminate the information to the public.

When submitting this additional information, please refer to the case number listed at the top left-hand corner of this letter, and send it to: The Freedom of Information Group, Room N2-20-16, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

Any questions regarding the status of this request should be directed to **Joseph Tripline** at 410-786-5362.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael S. Marquis".

Michael S. Marquis

Director

Freedom of Information Group

# **EXHIBIT 4**

|  |  |
|--|--|
|  U.S. Department of Health & Human Services   | <a href="http://www.hhs.gov">www.hhs.gov</a> |
| <b>CMS</b> Centers for Medicare & Medicaid Services  |  |
| <input type="text" value="Search"/>  |  |
| <a href="#">Home</a>   <a href="#">Medicare</a>   <a href="#">Medicaid</a>   <a href="#">CHIP</a>   <a href="#">About CMS</a>   <a href="#">Regulations &amp; Guidance</a>   <a href="#">Research, Statistics, Data &amp; Systems</a>   <a href="#">Outreach &amp; Education</a>   <a href="#">Tools</a> |  |
| <a href="#">People with Medicare &amp; Medicaid</a>   <a href="#">Questions</a>   <a href="#">Careers</a>   <a href="#">Newsroom</a>   <a href="#">Contact CMS</a>   <a href="#">Acronyms</a>   <a href="#">Help</a>   <a href="#">Email</a>   <a href="#">Print</a>                                     |  |

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## Check the Status of Your FOIA Request

Please enter the Control Number and Personal Identification Number (PIN) that you received in your acknowledgement letter.

### Search Criteria

An asterisk (\*) indicates a required field

\*Control Number:

\*PIN:

### Your FOIA Request Status

Control Number: 042520117084

Date Received: 4/25/2011

Subject: Applications for Participation in Early retiree Reinsurance Program, And Claims for Reimbursements under ERRP

Status of the Request: FOIA request referred to program office(s) for responsive records search and fee estimate

Projected Date of Response: Undetermined

Date of Response: No data is available at this time

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Centers for Medicare & Medicaid Services, 7500 Security Boulevard Baltimore, MD 21244

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## **EXHIBIT 5**

**Centers for Medicare & Medicaid Services**

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**Check the Status of Your FOIA Request**

Please enter the Control Number and Personal Identification Number (PIN) that you received in your acknowledgement letter.

**Search Criteria**

An asterisk (\*) indicates a required field

\*Control Number:

\*PIN:



**Your FOIA Request Status**

**Control Number:** 042520117084

**Date Received:** 4/25/2011

**Subject:** Applications for Participation in Early retiree Reinsurance Program, And Claims for Reimbursements under ERRP

**Status of the Request:** FOIA request referred to program office(s) for responsive records search and fee estimate

**Projected Date of Response:** Undetermined

**Date of Response:** No data is available at this time

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# **EXHIBIT 6**


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## Check the Status of Your FOIA Request

Please enter the Control Number and Personal Identification Number (PIN) that you received in your acknowledgement letter.

### Search Criteria

An asterisk (\*) indicates a required field

\*Control Number:

\*PIN:



### Your FOIA Request Status

**Control Number:** 042520117084

**Date Received:** 4/25/2011

**Subject:** Early Retiree Reinsurance Program Applications And Claims for Reimbursements - CCIO

**Status of the Request:** FOIA request referred to program office(s) for responsive records search and fee estimate

**Projected Date of Response:** Undetermined

**Date of Response:** No data is available at this time

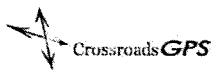
[Submit Feedback](#)

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[Web Policies & Important Links](#) | [Privacy Policy](#) | [Freedom of Information Act](#) | [No Fear Act](#)  
 Centers for Medicare & Medicaid Services, 7500 Security Boulevard Baltimore, MD 21244

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# **EXHIBIT 7**





**Crossroads GPS**

1401 New York Avenue NW

Suite 1200

Washington, DC 20005

P: 202.706.7051 | F: 202.318.8866 | [www.crossroadsgps.org](http://www.crossroadsgps.org)

# fax

TO: Freedom of Information Office

FROM: Steven Law

FAX: 410.786.0474

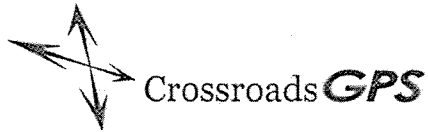
PAGES: 19 (incl. cover sheet)

PHONE:

DATE: 10/18/2011

RE: Freedom of Information Act Request – Control No.:  
042520117084 and PIN: ZAP9

CC:



October 18, 2011

**BY FACSIMILE – (410) 786-0474**

Freedom of Information Office  
Centers for Medicare & Medicaid Services  
U.S. Department of Health & Human Services  
7500 Security Boulevard, Mail Stop N2-20-16  
Baltimore, MD 21244-1850

Re: Freedom of Information Act Request – Control No.: 042520117084 and PIN: ZAP9

Dear Sir or Madam:

This letter serves as a request for an immediate response to the above-referenced request for documents made on April 19, 2011, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et. seq.*

Nearly six months have passed since my request was received, and I have not received anything from the United States Department of Health and Human Services (HHS) that satisfies its obligations under FOIA with respect to responding to my request. And, as explained below, I have made numerous unsuccessful attempts to contact you about my pending request. Moreover, as discussed below, the need for this information is more critical now that HHS has recently abandoned another component of the Obama Administration's health care reform package – the Community Living Assistance Services and Supports Act (the "CLASS Program") – after HHS Secretary Kathleen Sebelius concluded that the program was not viable.<sup>1</sup>

I must receive the requested information by October 28, 2011, or I will have no other recourse but to file a lawsuit to obtain it.

For your convenience, below is a summary of the relevant events.

- By a April 19, 2011 letter that was faxed to the FOIA office of HHS, I requested information in HHS' possession relating to applications for participation in, and claims for reimbursement under, the Early Retiree Reinsurance Program ("ERRP"), which was established pursuant to Section 1102 of the Patient Protection and Affordable Care Act (see attached letter for specific requests).
- By postcard dated April 22, 2011, HHS acknowledged its receipt of the request on April 21, 2011. Additionally, the postcard notified me that the request was forwarded to the Centers

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<sup>1</sup> Noam N. Levey, *Obama administration drops part of healthcare law*, L.A. Times, Oct. 14, 2011, available at <http://articles.latimes.com/2011/oct/14/nation/la-na-long-term-care-20111015>.

*Paid for by Crossroads GPS, an independent, tax-exempt organization organized under section 501(c)(4) of the Internal Revenue Code. Contributions are not deductible as charitable donations for federal income tax purposes.*

1401 New York Ave, NW Suite 1200 • Washington, DC 20005 • (202) 706-7051 •

[www.CrossroadsGPS.org](http://www.CrossroadsGPS.org)

CMS FOIA Office

October 18, 2011

Page 2

for Medicare & Medicaid Services (CMS). Although HHS stated that the request would be processed "as expeditiously as possible," it did not give a specific time by which CMS would respond, nor did it otherwise indicate any issues with the request.

- By letter dated April 26, 2011, CMS Freedom of Information Group Director Michael S. Marquis acknowledged CMS' receipt of the request and assigned it a control number and PIN. The letter also listed the following "unusual and exceptional circumstances" as impacting the office's response time: "(1) we will need to search for and collect records from components and/or field offices external to this office; and (2) because we receive a very heavy volume of FOIA requests, we will process your request in line with our established policy of 'first in, first out' case processing." The letter does not provide any other guidance regarding how long it will take the agency to complete its search.
- On May 24, 2011, five days after the standard 20 business day deadline for FOIA requests had elapsed, Simon J. Torres, an attorney at my counsel's office – Morgan, Lewis & Bockius LLP – twice called the CMS FOIA office via the phone number listed on the April 22 postcard. No one answered either call, and unfortunately he could not leave a voicemail because the mailbox was full.
- On June 7, 2011, Mr. Torres again called the CMS FOIA office, and although no one answered, he was permitted to leave a voicemail this time, where he specifically asked the office to call him back as soon as possible regarding the status of the request.
- On June 17, 2011, Mr. Torres called the CMS FOIA office and spoke to Ms. Brieta Gillard. Ms. Gillard told Mr. Torres that the request was in the system and that the office was still searching for records. Mr. Torres asked when we could expect the office to conclude its search, and Ms. Gillard said that she would check with the responsible analyst. When Mr. Torres reminded Ms. Gillard that the deadline for CMS to respond to the request had passed nearly a month ago, Ms. Gillard responded that the office has a "high volume" of requests.
- On June 29, 2011, Mr. Torres checked CMS' website ([www.cms.gov/apps/FOIA/check-status.aspx](http://www.cms.gov/apps/FOIA/check-status.aspx)) for a status update. Under "Projected Date of Response" the website listed only "Undetermined"; under "Status of Request" the website stated: "FOIA request referred to program office(s) for responsive records search and fee estimate." Mr. Torres also called the CMS FOIA office, this time using the phone number listed for Joseph Tripline in the April 26 letter. No one answered the call, however, and so Mr. Torres left a voicemail for Mr. Tripline requesting a status update.
- On September 9, 2011, Mr. Torres checked the status of the request on CMS' website. The "Projected Date of Response" and "Status of the Request" fields remained unchanged from June 29. Mr. Torres called Mr. Tripline, whose voicemail message indicated that he would be out of the office until September 12, 2011 and instructed callers to contact Ms. Angela Pompey in his absence. Mr. Torres left Mr. Tripline a voicemail requesting a status update.

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and return phone call, and then he called Ms. Pompey at the phone number Mr. Tripline's message had provided. Ms. Pompey did not answer either, however, so Mr. Torres left her a voicemail requesting a status update. Lastly, Mr. Torres called Ms. Gillard, who also did not answer. Mr. Torres left Ms. Gillard a voicemail requesting a status update.

- Later that day, Ms. Gillard left Mr. Torres a voicemail indicating that she had checked the system, which reported that CMS is still searching for responsive records. She also stated that she would "elevate" the request to Michael Marquis, the Director of CMS' Freedom of Information Group, and that Mr. Torres could call her with any questions.
- On September 12, 2011, Mr. Torres called Ms. Gillard and left her a voicemail asking for a status update.
- On September 13, 2011, Ms. Gillard returned Mr. Torres call and left him a voicemail. In her voicemail, Ms. Gillard stated, "I did elevate this to Michael Marquis. I actually gave him a copy of the request, and he has your telephone number so he's expected to give you a call; I'm not exactly sure what time." Additionally, Ms. Gillard stated that she would check with the analyst to see why we had not received a response to the request.
- To date, neither Mr. Torres nor I have heard from Mr. Marquis. In addition, neither Mr. Torres nor I have received any information from CMS that satisfies the request.

The "core" purpose of FOIA is to require government agencies to disclose information that "contribut[es] significantly to public understanding of the operations or activities of the government." *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (internal citations and quotations omitted). HHS' own website explains: "The Freedom of Information Act (FOIA) is a critical component of HHS' Open Government efforts." In his Memorandum for the Heads of Executive Departments and Agencies concerning FOIA, President Obama not only stressed the value and importance of FOIA, but expressly emphasized the importance of timely responses to FOIA requests: "In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public." Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009).

FOIA requires HHS to respond to my request within 20 business days and to notify me that it will comply with my request and supply me with the requested documents or inform me that it will not comply (and explain both its reasons and that I have the right to appeal the adverse decision). 5 U.S.C. § 552(a)(6). HHS has not complied with this requirement – my request was received by HHS on April 21, 2011, and the agency has failed to respond to my request as required.

The need for the requested information is immediate, especially in light of the Obama Administration's scrapping of the CLASS Program. After months of defending the CLASS Program as an essential part of the Obama Administration's health care reform package, on October 14, 2011,

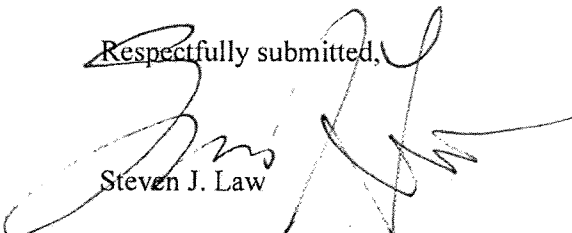
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Secretary Sebelius accepted the inevitable when she announced in a letter to Speaker of the U.S. House of Representatives John Boehner, "[d]espite our best analytical efforts, I do not see a viable path forward for CLASS implementation at this time."<sup>2</sup> This admission was long overdue, as CMS' chief actuary Richard Foster warned in April 2010 that the program was not self-sustaining.<sup>3</sup> Although the Obama Administration has tried to separate the CLASS Program from the rest of the health care reform package, it is increasingly evident that this legislation – including the ERRP – is not beneficial for the country. Under FOIA, we are entitled to documents that will enable us to evaluate this Administration's policies, and it is for this purpose that I seek the requested information pertaining to the ERRP applications and reimbursement claims immediately.

As is plain, it is critical that HHS immediately provide the information FOIA required it to turn over approximately five months ago. **Thus, I must receive the requested information – including all relevant information relating to waivers that have been considered since the date of my request – no later than next Friday, October 28, 2011. If I do not receive the requested information by this date, I will have no choice but to file a lawsuit in federal court.**

Your prompt attention to this matter is appreciated. Please contact Mr. Torres at (202) 739-5617 to discuss.

Respectfully submitted,



Steven J. Law

Enclosures

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<sup>2</sup> Secretary Sebelius' Letter to Congress about CLASS, <http://www.hhs.gov/secretary/letter10142011.html> (last visited Oct. 17, 2011).

<sup>3</sup> Alex Wayne and Drew Armstrong, *U.S. Won't Start Long-Term Care Insurance*, Bloomberg, Oct. 14, 2011, available at <http://www.bloomberg.com/news/2011-10-14/u-s-won-t-start-class-long-term-care-insurance-sebelius-says.html>